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Supreme Court, U. S.
FILED
DEC 6 1972

In the Supreme Court of the United States

October Term, 1972

No. 71-1553

JOHN J. GILLIGAN,
Governor of Ohio,
DANA L. STEWART,
Adjutant General of Ohio,
ROBERT H. CANTERBURY,
Assistant Adjutant General,
Petitioners,

v.

CRAIG MORGAN,
THOM DICKERSON,
WILLIAM SLOCUM,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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December 6, 1972

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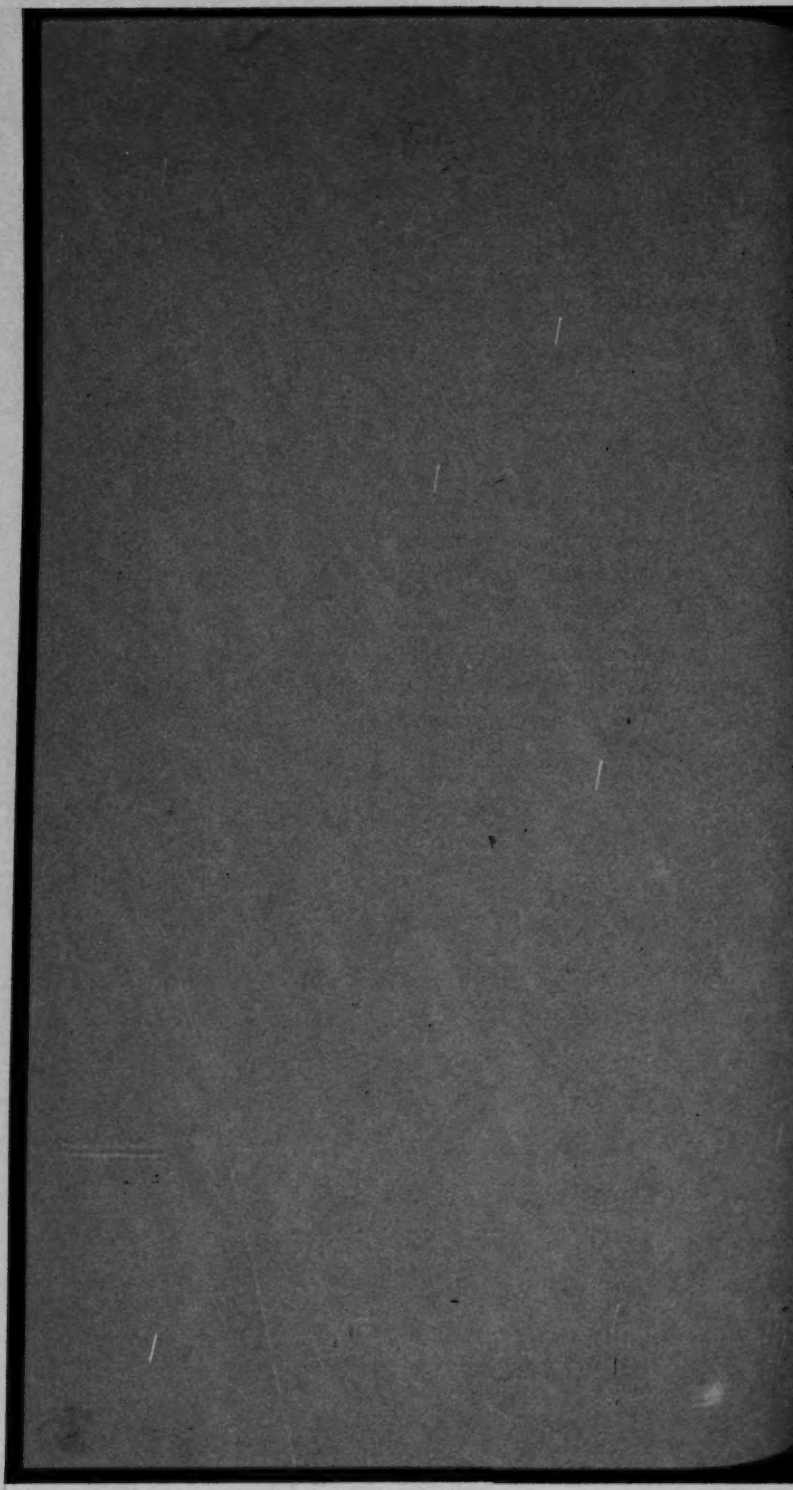

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	3
Summary of Argument	5
Argument:	
I. The issue of the propriety of the training, weaponry and orders of the National Guard is a non-justiciable political question	6
II. Any injunctive relief which the district court could grant would be an unwarranted interference with the ability of the State to protect itself from civil disorders	11
Conclusion	13

CITATIONS

Cases:	
Baker v. *Carr*, 369 U.S. 186	6, 7, 9, 11
Bute v. *Illinois*, 333 U.S. 640	11
Haines v. *Kerner*, 405 U.S. 519	7
McInnis v. *Shapiro*, 293 F.Supp. 327 (affd. sub. nom. *McInnis* v. *Ogilvie*, 394 U.S. 322)	10
Reynolds v. *Sims*, 377 U.S. 533	7
Sterling v. *Constantin*, 287 U.S. 378	12
Union Brokerage Co. v. *Jensen*, 322 U.S. 202	11
Younger v. *Harris*, 401 U.S. 37	12
United States Constitution: Article I, Section 8, Clause 16	8

CITATIONS (cont.)

United States Statutes:

Title 32, Section 108 .....

Title 32, Section 110 .....

Title 32, Section 501 .....

Title 32, Sections 502-507 .....

Title 32, Section 701 .....

Ohio Statute:

2923.55 Ohio Revised Code .....

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OPINION BELOW

The opinion of the Court of Appeals is reported at 456 F 2d 608. This opinion is contained in the Petition for Writ of Certiorari filed herein.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 15, 1972. The petition for a writ of certiorari was filed within ninety days of that

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date and was granted October 24, 1972. This court's jurisdiction rests on 28 U.S.C. 1254(1).

The basis for jurisdiction in the first instance was 28 U.S.C. 1343(3).

QUESTIONS PRESENTED

1) Whether the issue of the proper training, weaponry and orders of members of an organized National Guard is nonjusticiable as a political question.

2) Whether injunctive relief controlling the training, weaponry and orders of the National Guard would violate the longstanding policy against interference by a federal court with the legitimate activities of a state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article 1, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

United States Code, Title 32:

Section 108. Forfeiture of Federal benefits.

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110. Regulations.

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

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Section 501. Training generally.

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701. Uniforms, arms, and equipment to be same as Army or Air Force.

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

Ohio Revised Code.

Section 5923.22. Call of militia in case of riots or mobs.

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.

No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order isued in such case.

STATEMENT

On May 1, 1970, there occurred certain disorders in and about the area of Kent State University, in Kent, Ohio. These disorders had not been terminated by normal civilian controls. The Governor of Ohio on May 2, 1970, therefore ordered certain contingents of the Ohio National

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Guard to duty in and around the Kent campus to assist the local authorities in controlling the disorders.

Respondents, (herein referred to as plaintiffs) alleging that they were fulltime students and officers in student government at Kent State University, commenced this action on October 15, 1970 against James A. Rhodes, who was then Governor of Ohio; Sylvester DelCorso, who was then Adjutant General of Ohio; and Robert Canterbury, who was then an assistant to the Adjutant General. In substance, plaintiffs claimed that defendant Rhodes "prematurely" ordered the National Guard troops to duty; that the National Guard troops, while on duty, committed certain acts which deprived the students of rights guaranteed by the Constitution of the United States; and that Section 2923.55 of the Ohio Revised Code, which under certain, specified conditions grants immunity to National Guard troops, was unconstitutional. Plaintiffs also alleged that the actions and operating methods of the Ohio National Guard and the continuance of the same rules, procedures and operating methods under the supervision of the named defendants created a substantial threat of repetition of similar acts. Plaintiffs sought an injunction against defendant Rhodes and his successors in office from "prematurely" ordering the National Guard to duty on the Kent campus; an injunction against all defendants and their successors in office from ordering the National Guard to duty on the Kent campus unless they had been competently trained, had been provided with the best available nonlethal equipment, had been specifically ordered not to use deadly force, and had been ordered not to carry live ammunition. Plaintiffs also requested that Section 2923.55 of the Ohio Revised Code be declared unconstitutional.

The district court sustained the defendants' motion to dismiss, finding that the complaint failed to state a claim upon which relief could be granted.

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On appeal, the Court of Appeals for the Sixth Circuit affirmed the district court in its refusal to grant injunctive relief against the Governor "prematurely" calling out the National Guard. It also found that Section 2923.55 Revised Code on its face presented no substantial constitutional issue. However, the majority of the court interpreted the complaint to state the following issue:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that non-lethal force would suffice to restore order and the use of lethal force is not reasonably necessary?"

The cause was remanded to the district court for a hearing on this issue.

John J. Gilligan, Governor of Ohio and successor to James A. Rhodes in that office; and Dana L. Stewart, Adjutant General of Ohio and successor to Sylvester DelCorso in that office, filed a petition for a writ of certiorari to this court to review that portion of the judgment and opinion which remanded the cause to the district court. Plaintiffs took no action with respect to the remaining portions of the judgment.

SUMMARY OF ARGUMENT

Petitioners do not contend that the actions of the National Guard and its officials and members may never be subject to judicial review nor held responsible for their actions. Neither do they contend that conduct, which is illegal on its face and could never be justified as a valid exercise of discretion, may not be enjoined. However, these issues are not present in the instant case. The legality and propriety of the conduct complained of depends upon the conditions which prevailed on the Kent campus in May 1970. Any relief which controls the training, weap-

onry and orders of the National Guard and which restricts the discretion of officials, federal and state, who are responsible for such matters, must predetermine the conditions which will prevail and the measures which will be required to control them.

Petitioners contend that the propriety of the training, weaponry and orders of the National Guard presents a nonjusticiable political question. The Constitution commits the authority and responsibility to Congress. Any relief granted by the district court would express a lack of respect for the legislative and executive branches and could result in conflicting directions on the subject. In addition, there is a lack of judicially discoverable or manageable standards for resolving the issue.

Petitioners also contend that any relief which the district court could grant would constitute an undue interference with the ability of the state to preserve the peace and maintain order.

ARGUMENT

The Issue Of The Propriety Of The Training, Weaponry And Orders Of The National Guard Is A Non-Justiciable Political Question.

The judgment of the Court of Appeals rendered herein remanded the cause to the district court to determine whether injunctive relief should be granted to control the training, weaponry and orders of the Ohio National Guard. The applicable decisions of this Court establish that this issue is a non-justiciable political question.

The majority below dismissed this contention by stating that decisions of this Court in the areas of voting rights and prisoners' rights establish the "diminished vitality" of the political question doctrine. *Baker* v. *Carr*, 369 U.S. 186 (1962), is one of the cases relied upon by the

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Court of Appeals in support of this statement. That case involved a claim that the apportionment of the state legislature deprived the plaintiffs therein of the equal protection of the laws. This Court found that the claim therein did not involve a non-justiciable political question. However, the decision clearly did not abolish the political question doctrine. The majority opinion contains an extensive review of the previous decisions in this area and explains the factors which will present a political question.

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (369 U.S. at 217)

Reynolds v. *Sims*, 377 U.S. 533 (1964) and *Haines* v. *Kerner*, 405 U.S. 519 (1972), the other two cases relied upon by the majority below, did not even discuss the political question doctrine.

The opinion and the cases reviewed in the *Baker case* indicate that the existence of any one of these factors may present a political question which will justify the dismissal of the action. Each of the factors are present in the instant case. There is a "textually demonstrable constitutional

commitment of the issue to a coordinate political department". Article I, Section 8, Clause 16, of the Constitution gives Congress the authority to prescribe the proper training, weaponry and discipline for the militia:

> "The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Pursuant to its constitutional authority, Congress has enacted legislation governing the training and weapons of the National Guard. Congress has provided that the training of the Army National Guard shall conform to the training of the Army. 32 U.S.C. 501. See also: 32 U.S.C. 502-507. It has also provided that the same types of arms and equipment shall be issued to the National Guard as are issued to the Army, 32 U.S.C. 701. In addition, Congress has authorized the President to prescribe regulations governing the National Guard.

> "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. 110.

Congress has also given the President the means to enforce any regulation which he or Congress may prescribe.

> "If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law." 32 U.S.C. 108

Any relief which the district court could grant in the instant case would express a lack of respect for the execu-

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tive and legislative branches of the government. Congress is vested by the Constitution with the authority and responsibility to train and provide weapons and equipment for members of the National Guard. The President also has the authority to prescribe regulations concerning these matters. Any judicial determination as to the proper training, equipment or orders of the National Guard would necessarily indicate a lack of confidence in the legislative and executive branches to carry out their responsibilities.

Any relief which the district court could grant would also create the potentiality of multifarious, and even conflicting, pronouncements by the various departments on this subject. Congress, pursuant to its constitutional authority, has enacted statutes governing the training and weaponry of the National Guard. See, e.g., 32 U.S.C. 501, *et seq.*, and 32 U.S.C. 701. Congress may enact new statutes or amend existing statutes in the future. In 1970, a bill which would have required the Governor to seek specific approval of the President before guardsmen could carry live ammunition was introduced in the Senate. 116 Con.Rec. S 13707 (81970). The President has prescribed regulations concerning the training of the National Guard. See dissenting opinion, Judge Celebrezze below, 456 F2d at 619. He also may prescribe new regulations on the subject in the future. If the Court attempts to prescribe the training, weapons or orders of the National Guard, there is a real possibility that such an order would conflict with either existing or future directives from Congress or the President.

The real danger caused by a conflict between a judicial order and the directives of Congress or the President is not the "embarrassment" mentioned in the *Baker case*, 369 U.S. at 217, *supra*. It is the confusion and resulting delay which such conflicting directives would cause. It might even be necessary to seek a judicial resolution of the con-

flict before the National Guard could act. In dealing with civil disorders, the state must be able to act immediately. If there is delay, the harm to be prevented could be accomplished without resistance.

The majority below attempted to frame the issue in familiar judicial terms: Whether nonlethal force would be inevitable where such force is not reasonably necessary. However, an analysis of this issue shows it is not appropriate for judicial determination. Courts are particularly ill-suited to determine the best system of the training, weaponry and orders of a military organization such as the National Guard. Judicial decisions are necessarily inflexible. A court is not able to provide the continuing supervision and revision necessary for intelligent military planning. Cf. *McInnis* v. *Shapiro*, 293 F.Supp. 327 (N.D. Ill. E.D. 1968) affd. sub nom. *McInnis* v. *Oglivie*, 394 U.S. 322 (1969).

A court in making its determination is limited to the evidence presented and the arguments made by the parties. In the instant case it may be assumed that the evidence will be concentrated on the issue of infringement of constitutionally protected rights by the National Guard troops. Many other considerations are relevant in determining the proper training and equipment of such troops. Such training and equipment must be sufficient to protect the safety of the troops themselves; to protect the safety and property of those in the area of the disturbance; to enable the troops to control the disturbance and restore order as soon as possible; etc. Either the legislative or executive branch could deal with this issue in a wider context and provide a more complete solution than a court.

In addition, a court would not have adequate means to discover the information necessary to resolve the issue. There are almost continuous advancements in the equipment and weapons which could be made available to

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National Guard troops. There are also constant developments and changes in military theories on the proper method of training troops. Neither the courts nor the individual parties to the litigation are likely to have ready access to such information. Both the executive and legislative branches of the government have means of gathering the relevant data which are vastly superior to that of the judiciary.

Even if the courts could have access to such information, the legislature or the executive are in a better position to render the best possible solution to the problem. The court has no means to determine how new equipment or new theories of military training will function in an actual emergency. In contrast, the Executive, through the Department of the Army, does have means available for testing new equipment and new methods of training under simulated emergency conditions.

The issue presented herein is a non-justiciable political question under the criteria set forth in *Baker* v. *Carr, supra,* 369 U.S. at 217. The Court of Appeals therefore erred in refusing to affirm the dismissal of the Complaint by the district court.

Any Injunctive Relief Which The District Court Could Grant Would Be An Unwarranted Interference With The Ability Of The State To Protect Itself From Civil Disorders

In areas of possible conflict between the interests of the state and federal government, this Court has consistently attempted to resolve the conflict in a way which will avoid undue interference with the legitimate interests of either the state or federal government. See, e.g., *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 207-208 (1944) and *Bute* v. *Illinois,* 333 U.S. 640, 658-659 (1948). This con-

cept referred to as "Our Federalism", was reaffirmed and explained in *Younger* v. *Harris*, 401 U.S. 37 (1971).

> "What the concept [Our Federalism] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." (401 U.S. at 444)

In the instant case, any relief which the district court could give would unduly interfere with a legitimate and vital interest of the state: the maintenance of peace and order.

A state has no more important interest than in maintaining its ability to preserve the peace and control disorders. This is necessary not only to protect the safety and well being of its inhabitants, but also to ensure its own continued existence. Those persons who have the responsibility for maintaining peace and controlling disorders must be granted "broad discretion." *Sterling* v. *Constantin*, 287 U.S. 378, 398-399 (1932). The majority below recognized this need in denying injunctive relief against the Governor.

This broad discretion is necessary not only in dealing with the emergency itself but also in preparing to meet such emergency. There is no way to predict disorders. They may occur at any time or place. Neither is there any way to know in advance what measures will be necessary to control them. Those officials who have the responsibility for training and equipping members of the National Guard must therefore be free to prepare for any eventuality.

Any relief which the district court could grant controlling the training, weaponry or orders of the National Guard would by definition restrict the discretion of these officials. Anything which restricts this discretion impairs

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the ability of the state of Ohio to prepare for and control civil disorders. Such relief would therefore unduly interfere with one of the most fundamental and vital interests of the state.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this portion of the judgment of the court below should be reversed.

Respectfully submitted,

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